

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

| | | |
|--|---|--------------------|
| ROWENA ROMA |) | |
| Claimant |) | |
| VS. |) | |
| |) | |
| COPPER CRAFT |) | Docket No. 237,948 |
| Respondent |) | |
| AND |) | |
| |) | |
| AMERICAN MOTORIST INSURANCE COMPANY |) | |
| Insurance Carrier |) | |

ORDER

Respondent appeals from the preliminary hearing Order of Administrative Law Judge Brad E. Avery dated January 14, 1999. The Administrative Law Judge granted claimant temporary total disability compensation and medical treatment, finding claimant had proven that she suffered accidental injury arising out of and in the course of her employment and that timely notice was given. In addition, the Administrative Law Judge found that, had claimant failed to provide notice within the time limits required, there was just cause for claimant's late notice because respondent failed to post information about the Workers Compensation Act, as is required by K.A.R. 51-12-2.

ISSUES

- (1) Did claimant sustain an accidental injury arising out of and in the course of her employment?
- (2) Did claimant provided timely notice?
- (3) Is the need for treatment causally connected to the alleged accidental injury?

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds the Order of the Administrative Law Judge should be affirmed.

Claimant alleged accidental injury on September 22, 1998, while she was lifting a cardboard flat with forged bases. Claimant suffered a sudden onset of pain at that time and dropped the bases to the floor. She had difficulty breathing for a moment due to the severity of the pain. Claimant met a coworker, Adeena Landis, when she was leaving work. Ms. Landis, who did testify in this matter, had noticed claimant was crying and inquired about the problem. Claimant told Ms. Landis about lifting the flat full of forged bases and about the sudden onset of pain in her back. Ms. Landis recalled hearing the bases falling and hitting the floor, but did not then investigate the source of the noise.

Claimant testified she told her plant manager, Cole Newstrom, three days later, but he was unwilling to listen to her complaints.

It is acknowledged by all parties that claimant has had a long history of ongoing back symptoms and problems. She had been receiving medical treatment from numerous doctors and had been diagnosed with significant back problems, including preexisting arthritis, bulging discs, and chronic low back pain with persistent radiculopathy.

Claimant was provided treatment by Dr. Michael J. Schmidt, an orthopedic surgeon. Dr. Schmidt, in a letter dated October 12, 1998, opined that claimant's ongoing back problems were aggravated by her work with respondent. Dr. Schmidt indicated that she had advised him of the September 22, 1998, lifting incident, although his medical records do indicate she did not advise him immediately, but waited until October 2, 1998, when he received a phone call from her regarding her back symptoms.

Respondent's representative, Mr. Newstrom, testified that he did not receive notice of claimant's alleged injury until October 20, 1998. He was aware of claimant's long history of back pain and problems, but not that she was alleging a work-related involvement.

In proceedings under the Workers Compensation Act, the burden of proof is on claimant to establish the claimant's right to an award of compensation by proving the various conditions upon which claimant's right depends by a preponderance of the credible evidence. See K.S.A. 1996 Supp. 44-501 and K.S.A. 1998 Supp. 44-508(g).

In this instance, the Administrative Law Judge had the opportunity to view the witnesses during live testimony. The Appeals Board has held in the past, and continues to hold, that some deference should be given to an administrative law judge's conclusions when he or she has the opportunity to assess the credibility of the witnesses through live testimony. In this instance, the Administrative Law Judge found the testimony of claimant and of Ms. Landis to be the more credible. The Appeals Board agrees. There is no witness testimony to contradict claimant's description of the accident. It is acknowledged that claimant failed to timely mention the accident to Dr. Schmidt, but the Appeals Board finds claimant's description of the accident, supported by the testimony of Ms. Landis, is sufficient proof for purposes of preliminary hearing.

With regard to notice, the Appeals Board accepts claimant's statement that she attempted to describe the incident to Mr. Newstrom, the plant manager, and he refused to listen. Even had claimant failed to provide notice under these circumstances, just cause would exist as respondent failed to post the required workers' compensation notices as set out in K.A.R. 51-12-2. The only such notice posted was near the men's restroom and it was acknowledged by respondent's witness that claimant would probably not have the opportunity to see that posting.

The Appeals Board, therefore, finds that claimant has proven, for preliminary hearing purposes, that she suffered accidental injury arising out of and in the course of her employment with respondent, that timely notice was provided to respondent of the accidental injury, and that the need for treatment is related to the alleged accidental injury of September 22, 1998.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Brad E. Avery dated January 14, 1999, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of March 1999.

BOARD MEMBER

c: Thomas Odell Rost, Topeka, KS
Michael W. Downing, Kansas City, MO
Brad E. Avery, Administrative Law Judge
Philip S. Harness, Director